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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-699

LESLIE BARBEE PONDER, JR.,

Petitioner

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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UNITED STATES SUPREME COURT

OCTOBER TERM, 1971

NO. _____

LESLIE BARBEE PONDER, JR.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Fifth Circuit

PROCEEDINGS BELOW

The Court of Appeals, on appeal by Ponder from the final judgment in the United States District Court for the Eastern District of Louisiana, affirmed the conviction in that Court on two indictment counts of violating provisions of 26 U.S.C. Sec. 7206 (1) [1954 IRC 7206(1)]. That section is sometimes referred to as the income tax false statement provision. The two counts covered his 1960 and 1961 Federal income tax returns, respectively.

The only action by the trial Court which might be referred to as its opinion was the announcement of sentence after verdict; it was delivered from the bench.

The decision and opinion by the FIFTH Circuit, affirming on appeal, is published in 444 F. 2d. 816. Annexed infra, as Appendix 1, is a complete copy of that opinion and decision. Petition for rehearing was denied, and a complete copy of the order of denial is annexed infra, as Appendix 2.

JURISDICTION

The jurisdiction of this Court is invoked under authority of the provisions of statute 28 U.S.C.A. Sec. 1254(1). A copy of that statute is set out infra, as Appendix 3.

The decision by the Court of Appeals was entered on the 28th day of June 1971, at 5:00 o'clock P .M. The order of that Court denying the petition for rehearing, was entered on the 29th day of September 1971, at 5:00 o'clock P .M. That Court enlarged until the 27th day of November 1971 the stay of its mandate in the cause; and this Court enlarged until 27 November 1971 the time by which this petition might be filed. Annexed as Appendix 4 infra is a copy of the Circuit Court enlargement order, and as Appendix 5 infra a copy of the said order from this Court.

QUESTIONS PRESENTED

The questions concern direct violation of constitutional rights and immunities, and abuse of rights to fair trial. They are now delineated.

I. Invalid Grand Jury

Whether, --

When the Court entered its written order that seven named parishes (Louisiana equivalent of common lawstate counties) be the sources for names listed to be drawn on for grand and petit jurors, but the Commissioner and Clerk intentionally provided names from only six of those named parishes, the indictment of Ponder by a grand jury whose names were out of those six parishes only, the indictment was invalid as not returned by a properly drawn grand jury.

II. Enforced Self-incrimination

Whether, --

When Internal Revenue Service had finished its civil audit without deficiency determination, but still had the records of Ponder over his demand for their concurrent return, his rights were violated by Internal Revenue Service in copying such records for use exclusively in gathering criminal case evidence, and by the Court in admitting into criminal trial evidence for the Government part of such copied product, over objection.

III. Materiality Under The Indictment

Whether, --

When the indictment charged filing returns but not believing them true in every material matter, but described only certain income, and the prosecution witness admitted there was no deficiency. Ponder was not informed by the indictment of the material matters he was obliged to meet, so that his

motion to quash on those grounds was denied erroneously.

IV. Fair Trial

Whether, --

When the Court refused Ponder in his profert of authenticated evidence tending to show that the prosecution amount of allegedly omitted income was substantially erroneous, and then gave an instruction that the jury must determine the correctness of said income, Ponder was deprived prejudicially of fair trial.

V. Instructions Including Erroneous Law

Whether, --

When the Court instructed the jury that its duty was to determine whether Ponder had paid his correct tax, and gave them an erroneous instruction on tax law, but precedently had refused Ponder the right to show no tax due or to argue the same to the jury, Ponder was deprived prejudicially of fair trial.

VI. Denial of Confrontation

Whether, --

When the Court permitted the prosecution, over objection, to undertake proof of its case in part by mere identification of two deposits -- among a considerable number not here at issue -- but had no witness to describe the part Ponder had in the deposits, it was unconstitutionally erroneous to let those amounts go to the jury.

CONSTITUTIONAL PROVISIONS INVOLVED

The rights and immunities provided by the United States CONSTITUTION, through its FOURTH, FIFTH and SIXTH articles of amendment, are involved gravely in this cause. Those amendments are set forth infra as Appendix 6, Appendix 7 and Appendix 8, respectively.

Those provisions, particularly, are concerned in the questions of copying and introducing copies of the Ponder records; the non-confrontation question; and the question of sufficiency of the indictment when referring to material matter in the indictment year return. The FIFTH amendment, through its requirements for indictment by a grand jury and due process of law, are basis for the constitutional right to a valid grand jury selection.

STATEMENT OF THE CASE

I. The Grand Jury

Ponder was indicted on one count that he made and filed his 1960 Federal income tax return (Form 1040) when he did not believe the same to be true and correct in every material matter, in that his law business income was understated thereon in a stated amount, and that he omitted a director fee which he had received. He was indicted on the second account respecting his 1961 return in the same words, but different amounts, plus a third item of omitted interest. The indictment is among the papers certified to the Court from the Court below as the record for this petition.

He moved to quash the indictment on the

ground that it failed to inform him. That motion was denied. It is among the certified record papers.

Ponder also moved to quash the indictment on the ground that the Grand Jury was improperly drawn. This motion was repeated, and denied on all presentations. There was more than one proof of good ground, but the only one brought here is that now described.

The Court had dismissed the first indictment, of which this is only a later edition, on the ground of an invalid grand jury. Meanwhile, the Court had revised its rules for jury selection, designating seven parishes as name sources, in lieu of the previous five parishes. The five-parish order -- in effect during 1948-1966 -- and the seven-parish revision order -- in effect for this Grand Jury -- are annexed infra as Appendix 9 and Appendix 10, respectively.

The Jury Commission, however, drew its names (1,600, more or less) from only six of the designated parishes. No names from St. John the Baptist Parish are on that list. The master list appears as an appendix to the petition for rehearing below, and is among the papers certified to this Court as the record on this petition.

When the Grand Jury list was drawn from the six-parish list, that was accomplished by taking the first 50 names. That shut out the other parish (St. Charles) which was ordered by the Court to be among the seven parishes of name sources. The Grand Jury list included no names from either of the sixth and seventh parishes in the Court order. The Grand Jury list and the Grand Jury panel are included among the papers certified to this Court as

the record on this petition.

II. Self-incrimination

The Internal Revenue Service held the records of Ponder for his taxable years 1959 and 1961 under their administrative summons. The Service issued a statutory notice of deficiency for the taxable year 1959. They returned to him, at his request, his records for that year which included some part of his 1960 records bound with them. The 1959 records are of no matter in this petition and it appears that the bulk of his 1960 records were examined only in his offices. But others of his 1960 records were bound in with his 1961 records.

Ponder wrote for his 1961 records, and the Service commenced copying them the next day after receiving his request. They terminated his civil case without deficiency the day they received his request for return of his records. The copy product was used as sources for leads and as evidence in the criminal investigation and the trial. (444 F.2d. 819, N.3. Appendix infra.)

The correspondence appears as a note in the opinion below. (444 F. 2d. 816, 819, N.5; Appendix infra.) A description of the records at issue appears among the papers certified to this Court as the record on this petition.

Ponder moved for suppression of all evidence which was the fruit of those copied records, and the motion was denied. The motions and minutes of denial proceedings are included, likewise, among the papers certified to this Court as the record on this petition.

III. Materiality Under The Indictment

IV. Fair Trial

V. Erroneous Instructions on Law

The indictment alleged criminal violation through its allegation of no belief in the correctness of every material matter in the returns. It recited the specifications of income described supra as the material matter. It recited nothing else on materiality.

The Court, in its charge to the jury, defined material matter as

> "...any item contained in an income tax return which would substantially affect the amount of tax declared to be due would be of a material element."

That definition is given in the instructions paragraph which would be paragraph number 41, if the paragraphs were numbered. The instructions as an entirety are included among the papers which are certified to this Court as the record on this petition.

The next paragraph of the instructions, or that which would be number 42 if the paragraphs were numbered, instructs by illustration that which would be a substantial underpayment.

The only reference in the record to tax or underpayment is found in the transcript of cross-examination of Special Agent Lloyd Smith, who testified that there was no deficiency determined.

The Court charge, to the jury, in its paragraph which would be number 64, if the paragraphs were numbered, gave this instruction:

> "You have heard the defendant's attorney argue that because the government has not made a claim for civil tax liability from the defendant, you may infer that this shows inconsistent conduct on the government's part. I instruct you to disregard that argument as irrelevant. . . . "
>
> * * * * *
>
> "... The fact of the matter is this: once the government begins a criminal prosecution for fraudulent statements on income tax returns, the government will hold up on any civil proceeding which could result in the defendant paying a larger tax, so that should play no part in your considerations."

The record of the trial does not reflect any reference to such a fact as that declared by the Court to be the fact. The record of pre-trial proceedings shows no such reference.

The court instructed the jury, by that portion of the charge which would appear as number 59 if the several paragraphs of the charge were separately numbered, on the method by which it must charge and credit Ponder respecting the law business income specification of each indictment count. The credits to Ponder, as given by the instructions, included credit to Ponder for advances

previously made to clients but collected out of amounts received on the case settlement, and certain expenses. There is no issue as to current-year expenses, but only as to rejection of the tendered evidence on prior-year advances. That evidence was of three classes, namely checks, file folders and Internal Revenue Service documents.

(a)

Ponder tendered authenticated checks from his law offices as direct prior-year advances to clients whose cases were settled in these two years. The prosecution allowed credit to Ponder for checks actually issued in these two years, and refused credit for those issued to clients in prior years against the possibility of settlement, as to cases actually settled in these two years. The prior-year checks were authenticated and offered on behalf of Ponder, and the Court sustained objections made by the prosecution. They were not admitted. The checks appear as Exhibits D-35 (Identification only) and D-40 (Identification only) among the certified papers. The Court had admitted one such check as Exhibit D-55, found among the certified papers, also. The Revenue Agents and Special Agent acknowledged that no credit for such checks was allowed Ponder. They acknowledged that, if there were any, he was entitled to credit for their amounts.

(b)

Ponder also tendered as his Exhibit D-62, a total of nine client case folders to illustrate the case history of his outpayments on behalf of current-year case settlement clients. They, similarly, were rejected in that their use was limited to client name

only. The purpose of their tender by Ponder, and explanation of their place in the case is found in the next following three paragraphs.

One area of evidence on which the prosecution dwelt at some length and in considerable detail was that Ponder had destroyed substantially all his case folders for these years on the settled cases in evidence. It is undisputed that he did so.

Ponder brought on testimony that the financial history of each case was recorded on the fly of the case folder. When the case was settled, Ponder reviewed with the client the amounts involved, gave the client a check -- or cash if requested -- for the client portion, and the client signed the folder fly. The folders in Ex. D-62 were among those retained, and bore the signature of the client, notably that of Motichek, the client with the largest settlement.

The settled case folders were reviewed at the end of each year and such contents as were believed to be useful as precedent, with the folder, were preserved. The remainder were destroyed. Motichek was among the valuable tort case files, because it bore on finger loss to the mother at childbirth, in malpractice actions. The settlement case for Motichecк supra appears as a part of prosecution Exhibit G-525: Summary of Testimony, 1960. The trial Court admitted the folders, but not their content and refused to send them to the jury when they requested everything they were entitled to see. The folders and the Government summary are among the papers certified in this cause.

(c)

Ponder also tendered explanation of his

method and that it had been in continuous use since it was examined without criticism or disapproval by Internal Revenue Service for years as far back as 1942-1947. This appeared in a special intra-Service memorandum, as a part of Exhibit D-69. (Identification only.) The memorandum described, and affirmatively found no fault in the Ponder procedure described preceding. The Court refused to admit it. It appears among the papers certified in this cause.

VI. Evidence by Non-confrontation

The prosecution offered, and the Court accepted into evidence over objection, three items of law business gross income receipts to Ponder for 1960 and two such for 1961. There was no witness testifying to the transactions. Witnesses from the insurance companies which paid certain claims testified that the check copies were secondary evidence of their lost or destroyed originals. The Vice President of the bank where Ponder maintained his law business accounts identified the check copies as transactions amount sources from which his bank credited the law business deposits of Ponder.

There was no other witness on the amounts or transactions.

There were others of such evidence items; the ones here are chosen for presentation because they are sufficient to represent the legal proposition involved.

The items are as follows:

1960

Frank Hurst (Ex. G-15)	$1,250.00
Wm. Stilley (Ex. G-86; G-132 Deposit Slip)	$3,000.00
John M. Johnson (Ex. G-59, G-138, Deposit slip)	$2,087.50

1961

George Bankston (Ex. G-20; G-222 Deposit slip)	$1,500.00
Frank Hurst (Ex. G-91; G-258 Deposit slip)	$5,000.00

The testimony from the bank officer appears in the record of proceedings, 12-9-69, and 12-11-69; the exhibits indicated by number and descriptive words or abbreviations, appear among the papers certified in this cause.

FEDERAL JURISDICTION BELOW

Jurisdiction was invoked below through Federal Grand Jury indictment on allegation of Federal criminal statute violation in that District. There is no challenge to the Federal status -- but this is not intended as waiver of the challenge to jurisdiction by reason of the invalid Grand Jury and other constitutional questions.

REASONS WHY THE WRIT SHOULD ISSUE

ARGUMENT

The trial Court and The Court of Appeals, with respect, cast aside all the teachings of the law as repeatedly held by this Court

respecting validity of the Grand Jury, and respecting the scrupulous observance of the rules for their selection sources. When the Grand Jury list is not drawn in accordance with the law as properly interpreted and applied, the fate of an accused is subjected to a mob scene no less than the kangaroo courts of lynch law. That is true for the simple reason that such an invalid body of persons, as here, had no more authority than does a mob. Dignity of Government procedures by which such powers were asserted here cannot raise such a group to the dignity of a legal body. So clearly has the valid Grand Jury doctrine been abused that intervention by this Court with its supervisory powers is clearly necessary in order to ensure viability for those doctrines by conformity. This Court has ruled consistently against the validity of that done below respecting the Grand Jury.

The issue of enforced self-incrimination here is of even broader importance in that it is a novel question of law in the administration of criminal justice. It has never been decided by any Court under the very peculiar circumstances here and, unless now decided by this Court, millions of citizens are exposed to the repugnent dangers of conviction by summons. That, in circumstances which are too strongly similar to ignore, is precisely the thing condemned by this Court in its landmarked decision in Boyd v. United States, 6 S. Ct. 524, 528, 532 (116 U.S. 616) 29 L. Ed. 746 (1886). A multitude of decisions have been handed down in areas on both sides of this issue, but none on this particular area. The controlling decisions from this Court on powers under an Internal Revenue Service administrative summons were not called upon to decide this issue and did not do so. A decision is necessary so that the field will

have been entirely covered by those decisions, plus this one.

The fair trial issue, including that of giving erroneous law as an instruction as to what the law is, was so flagrantly an abuse of fair trial management that it assumes unexpected importance. Ponder cannot say, in candor, that this issue is of far reaching effect or, even, that it is of great judicial importance. It affects only him but, while doing so, it was accomplished only through the brushing aside of well established rules of familiar learning. If Ponder be in error that there are such rules or, if there are such and they are not applicable to his case, then he can have no claim to any violations on this issue. If he be right, though, only the intervention of this Court can make right that which was prejudicially erroneous.

The issue of non-confrontation in criminal cases is clearly a constitutional question. The facts are few and undisputed. The law is plain and clear. There were no witnesses who testified to the transactions with Ponder, and yet the evidence was permitted against him. There is no escape from a conclusion that his rights were violated, and gravely.

Authorities and Their Application

I.

This court has always held that a valid Grand Jury selection is a constitutionally protected right. See e.g., Reece v. State of Georgia 76 S.Ct. 167 (350 U.S. 85) 100 L.Ed. 77. (reh. den. 76 S.Ct. 297 (350 U.S. 943) 100 L.Ed. 822), (1955). cf. dictum Carter v. Jury Com. of Greene County 90 S. Ct. 518

(396) U.S. 320) 24 L. Ed. 2d. 549 (1970).

That being the law, the only question remaining is that of whether this Grand Jury was validly selected. If it be valid for the jury commission to take names from only six designated parishes for its master list, while the order which directed the taking designated seven, including those six, then Ponder has no complaint. If the jury commission is required to follow the order it was executing, then Ponder has a proper case, for they did not do so. The Court of Appeals, with respect, when it decided the appeal of Ponder against him -- including his petition for rehearing -- ignored its own decisions that agencies must follow the orders under which they act. United States v. Bagley 436 F.2d. 55 (CA-5; 1970), and that a conviction under their procedures could not stand if such orders be not followed. The Court there emphasized that the orders and procedures must be followed with "strictness and fidelity". The same Court has held, also, on the particular question of failure by the jury list selectors to include required names that such failure was intentional because such selectors are presumed to intend "the natural result which flowed from their conduct." Rabinowitz v. United States 366 F.2d. 34, 56 (CA-5; 1966, Op. 16). It is from that holding that Ponder claims the omission of names from the required St. John the Baptist Parish was intentional.

While some names from the required St. Charles Parish were on the master list of some 1,600 names supra the method chosen for placing them in the jury panel selection wheel assured that none of them would appear on the panel. That method was to take the first 50 names for the Grand Jury and the next 350 names

for the petit juries panel. The remainder of the list was ignored. Casual review of the master list of some 1,600 names supra shows that the first 50 names could not reach St. Charles Parish names. But it reached names from all five of the original (1948-1960) order parishes supra. This technique set at naught the "revision" contemplated in the January, 1967 order for 7-parish sources supra. It also resulted in a grand jury that was not from a valid grand jury selection.

The method contemplated by the 1967 order is that of taking the first name from each of the seven parishes; that yields seven names. Then, it was contemplated, take the second name from each parish; and repeat the process in strict sequence until the list be completed. Such a system could not produce a grand jury panel of 50 names exclusively from the same old tired parishes that had furnished names during the preceding 18 years, finally ruled invalid. But the method which was actually followed did just that.

The explanation of the method contemplated as just described may be found in the record at the trial Court level, United States v. Brown 281 F.Supp. 31 (E.D. La.1968). It was stipulated in the Ponder trial, that the applicable portions of the Brown trial record, on the grand jury issue, become part of this record. Brown was pending on appeal to the Fifth Circuit when the Ponder conviction was appealed. But the Court dismissed the Brown appeal before deciding the Ponder appeal. While Ponder relied on the Brown record in his brief, reply brief and petition for rehearing, the Court below never considered it. The Brown case record includes testimony on the methods contemplated. Ponder moved

separately for remand in order to develop that record at the Trial Court level, and his motion was denied.

This grand jury clearly was not validly selected.

II.

The Court below decided that the constitutional rights of Ponder had not been violated, so it then went on to decide the remainder of the appeal on basis of sufficiency of evidence to support conviction. While doing so, the constitutional non-confrontation question having been merged, apparently, into the decision portion on the copying of records, the Court said that Ponder had received a fair trial and was without basis for complaint.

While the administrative summons, here, was the vehicle for opportunity to copy the records by Internal Revenue Service, the legal status of the summons is not at issue. Nor is anything done with the records by Internal Revenue Service during the life of the summons at issue. Ponder appreciates the state of the law as to an administrative summons, he hopes, and he raises the question of his protectable right for a date which was after expiration of the life of the summons and its legal effect.

The life of the summons and, hence, the powers of the Service under it, expired when the Service terminated its civil liability investigation without deficiency. That date was found judicially to have been the 8th day of July, 1963.

The summons necessarily expired on that date, as did power and authority under it, for

it shows on its face that it was issued for purposes of civil tax liability questions. Having found no liability, and no payments due, and having terminated its inquiry, the Service was holding the records of Ponder as private papers.

The Court below relies on cited case decisions to support its opinion that, once the Service holds the records of the taxpayer, no intervention may take them away. Subject to a severely limited area of exceptions that, indeed, is the state of the law. One important exception, and the one applicable here, is that of where the Service is holding such records for criminal case use only, but without any right to them.

It is familiar learning that, during a civil audit, the Service may copy anything before it. It even will be protected judicially to an awesome extent when taking papers themselves. That such product later be used in a prosecution does nothing against the rights of the prosecuted, because it was obtained or procured during course of a civil matter. However, when obtained while there is no civil proceeding, and solely for use in search for evidence of a crime, the atmosphere of that area becomes tainted. That contamination poisons the fruit of the effort, and it is use of that poisoned fruit which is condemned.

Had the Service copies the records on July 8, 1963, or any prior date, this question could not arise in this case. But, waiting deliberately until there no longer was a civil case and then copying the records solely -- as found by the Court below -- for criminal case evidence, the question did arise. The Government may not invoke executive power

alone to set aside the constitutional prohibition against enforced self-incrimination. The Court found that the records were copied on 9 July and 10 July; it found that the civil audit was terminated on 8 July.

Ponder moved before trial, and during the trial after the Government had rested, for the suppression of all evidence derived from the copying of his records or but of leads from that copying to any evidence presented. Those motions were denied. Ponder objected to every item of evidence respecting his gross income from any source for these two years, and was over-ruled.

The Court below relied on several decisions for its holding that, once the Service had the records, Ponder could never complain of their use made of those records. The confidence of the Court below in the decisions cited as its authority was entirely misplaced, with respect. None of those decisions held as claimed below.

The Court below (444 F.2d., at 818) held that the summons carries the right to copy. That is clearly accurate, but the cases cited do not suggest an extension of the right to copy into a period beyond the purpose life of the summons. No other Court has so held, either. If the right truly be so extended, then the taxpayer quite reasonably may anticipate a seizure and copying for criminal case usage after the records received under summons shall have been returned to him.

The Court below, also (Id., at 819) held that refusal of the records was the only protection available to Ponder and (Id., N. 5; N. 5A.) that it was too late to protest after

the Government had gained possession. If that truly be the law now, then the doctrine of suppression for fruits of unconstitutional acts has been pointed onto new and uncharted shoal waters. Ponder rejects that as the law.

The Court below further held (Id. at 819) that the Government may use in its prosecutions any information which was gained during a civil audit. That clearly, with respect, is the law; and it should never be otherwise, for the sovereign must be able always to detect and prosecute violations of its laws as provided by those laws. The holding below in this respect, however, could not be wider of the mark, for Ponder is complaining only against information gained from his private papers and without his consent while there was no civil audit. His complaint is, also, that he not only did not consent, but that he protested. The Court below held the belief that Ponder requested his records for business reasons, which gave him no constitutional protection (Id., N. 5A).

But the holding there obviously overlooked the wording of the demand (Id. 818, N.5.) which was this:

> "I have tried to co-operate with you fellows and gave you these records March 29, 1963 which I think is more than a reasonable length of time for you to keep the records and I must insist upon their return."

The "business reasons" referred to in the opinion below had reference only to the reason for "immediately" in the next

paragraph of the demand letter. The opinion below (Id., 819, N. 5A.) implies that privilege may be asserted only in some particular language not stated in the opinion. Ponder is unfamiliar with any authority holding to that effect, and the great weight of the law and its teachings is opposed to such a view.

It recessarily follows from the foregoing, with respect, that the Court of Appeals misperceived the question and misapprehended the applicable law as properly interpreted.

While the Court of Appeals (Id. at 819) relied also on a recent decision by this Court as authority for its holding: Donaldson v. United States 91 S. Ct. 534 (400 U.S. 27 L.Ed. 2d. 580 (1971) its application was miscast: Donaldson was in extenso for the prior interpretation of the summons provisions used by Internal Revenue Service, and their proper application as announced by this Court in Reisman v. Caplin 84 S.Ct. 508 (375 U.S. 440) 11 L.Ed. 2d.459 (1964.) But Reisman (84 S.Ct., at 513) held that a defense was good when it showed the improper purpose of obtaining evidence in criminal proceedings. And Donaldson (91 S.Ct., at 542, Op. 8,9) interpreted provisions of the rules to be properly applicable for standing to challenge the gathering of evidence to the extent that he may claim abuse of process and may exercise that claim on any subsequent trial. The authority cited below, then, appears to favor the cause of Ponder and to point away from the holding which it was tendered to support below.

The governing law is not the authority relied upon below, with respect. All those cited dealt with the upholding of the power

to summons, if within the statute, and with the use of evidence not tainted. This is not any of those cases. The real law, applicable here, is that against the holding below, as decided many times by this Court.

> "...any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime...is forbidden ..."

Boyd v. United States, supra; Gouled v. United States 41 S.Ct. 261, 263 (255 U.S. 298) 63 L.Ed. 647 (1921); Agnello v. United States 46 S.Ct. 4,7 (269 U.S. 20) 70 L.Ed. 145 (1925); Davis v. United States 66 S.Ct. 1256, 1258 (328 U.S. 582) 90 L.Ed. 1453 (1946) reh.den. 67 S.Ct. 107; Harris v. United States 67 S. Ct. 1098, 1103, 1116 (331 U.S. 145) 91 L.Ed. 1399 (1946) reh.den. 67 S.Ct. 1527; Shotwell Mfg. Co. v. United States 83 S.Ct. 448,453 (371 U.S. 341) 9 L.Ed. 2d. 357 (1963) reh. den. 83 S.Ct. 931; Malloy v. Hogan 84 S.Ct. 1489; 1493 (378 U.S. 1) 12 L.Ed. 2d. 653 (1964).

While practically all the decisions in this area are explanations and applications of the role just quoted supra some departed sufficiently to support a reasonable belief that this Court has kept a watchful eye for the multitude of variations which executive agencies may practice in circumvention of the amendment protection.

Thus, this Court has reaffirmed the protection in various phrasings.

> "Not every item may be seized which is properly inspectable

> by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them."

Abel v. United States 80 S.Ct. 683, 695 (362 U.S. 217) 4 L.Ed.2d. 668 (1960). This decision appears to be speaking of the Ponder case. No Court has ever decided that photo-copying without consent is not seizure. No Court has ever decided that the records of an individual, after expiration of the Internal Revenue Service summons life, did not automatically then revert to the status of private papers, no matter where physically located. But the effect of the decision below is to make such a decision, against the teachings by this Court.

It was clearly a deprivation of constitutional rights of Ponder when the Service copied his records for criminal case usage after there no longer was a civil case, and used the product for criminal investigation and prosecution.

III.

The Instructions

As shown in the face of the indictment, and by the jury instructions quoted supra, Ponder was handed a case on income, without deficiency, but the jury was handed a case on deficiency. Then, the instructions so contradicted themselves on those points that neither Ponder nor the jury could know what was to be decided.

If the instruction quoted on materiality supra, namely, any amount that substantially affected the tax due, be the correct legal definition for this case, then the Court erred in not granting the Ponder motion for acquittal when the Government rested. Accepting the trial Court definition of materiality (a tax effect); accepting the fact of no deficiency (from Special Agent Lloyd Smith); and accepting all the admitted evidence; there could be no conviction because the Government through its expect admitted there was no effect on the tax from such evidence. The "material" part of the indictment, then, was not proven on the face of things, and there remained no indictment issue.

If, on the other hand, the trial Court definition of materiality be accepted, then the Court, with respect, was in error when instructing the jury to disregard the Ponder argument of no deficiency as irrelevant. If materiality be that which substantially affects the tax, and there is no tax, there can be no violation of the statute. This is elementary, and requires no analysis of law for its application. The motion for acquittal, then, was denied erroneously on this ground.

Having defined materiality as a deficiency; in effect; and having undisputed evidence that there was no deficiency; the trial Court necessarily implied to the jury that there ought to be a deficiency somehow, by his instruction that a criminal case supends the civil case. That was erroneous and the Court of Appeals erroneously, with respect, affirmed the conviction against that objection. The trial Court may not be sustained in the giving of an instruction

as the law that which is not the law. It never has been the law and is not the law now. Even though Ponder objected, and raised the point on appeal, the error is so plain, and so prejudicial, that it requires judicial intervention on review.

The Court below reminds that the instructions must be considered in their entirety. Ponder does that here, for these are the entirety on materiality and deficiency. The remainder of the instructions never touch these questions.

Even if Ponder accept arguendo that the management of the trial was fair (but he took several points on appeal which he maintained deprived him of fair trial) these instructions ruined such chance as, otherwise, he might have had for fair trial.

Prior-year Client Advances

The trial Court further contradicted itself, to deprive Ponder of a fair trial by refusing evidence on the very point the jury was instructed that it must determine. That point was on the question of allowable deductions against gross law office income.

Mindfully that the Government allowed as exclusions from law business income only advances made during the indictment years, but conceded that those so made in prior years should not excluded also, Ponder brought on proof of such prior-year advances to these indictment year settlement clients.

Ponder showed below, for example, that the Morris Brown item of $981.85 as net law business receipts for 1960 on Exhibit G-525, would actually prove to be a loss of $1.37

when considered against the check for $25.00 to Brown (actually admitted into evidence) and the 23 Morris Brown prior-year checks in Ex. D-40 (ident. only).

The rejection was not only against the evidence of their being requisite to the method employed by the prosecution, but against the uniform standards of law announced by the Internal Revenue Service, itself. Canelo 53 T.C. 217, 218-20, 223-27, particularly, 226; Commissioner of Internal Revenue acquiescence, 1971 Internal Revenue Bulletin, at 7. There can be no argument that this is the law.

The File Folders (Ex. D-62)

When the file folders were authenticated as regularly maintained business records of Ponder, executed in the ordinary course of the very business for which the Government prosecuted him, Ponder because entitled to them as evidence on grounds of relevancy and materiality. The trial colloquy over their offer shows that they contained paid vouchers, among other things, for the very checks that the Government allowed as law business income deductions. The trial Court first excluded their content, then admitted them as naked folders, with the aforesaid record of client disbursements on the fly cover side. Then, when the jury during deliberation asked to see everything they were entitled to, the trial Court reduced their view to the name only. Once the Court had made that decision, the parties agreed on the language of the response to the answer, telling the jury they would not be sent. Obviously, the names only would be the same as nothing.

There was extensive evidence on those folders, and the jury was entitled to see them. Ponder was entitled to have them seen under contemplation of the business records rule. The instructions on materiality and on determination by the jury of the Ponder law business income show why they were necessary. Those instructions also show how Ponder was prejudiced when the folders were withheld from jury view.

The I.R.S. 1942-47 Memorandum

It has always been held, until this case was decided, that the defendant must have from the files of the prosecution anything not related to national security which would tend to help his cause. The Court required the prosecution to permit that Ponder inspect and copy the memorandum (Ex. D-69, Ident. only). The memorandum, covering consideration of a substantial deficiency determination for 1942-47, reviewed at length the method that Ponder used for keeping his records, explained the system of review and destruction as to the case file folders, and concluded it was not part of basis for fraud findings; the review reduced the deficiency to approximately 10% of the amount determined, none of it in the law business. The Court explained that it excluded the memorandum because it was remote. Former Revenue Agent Ernest J. Peter testified on 12-12-69 during the trial that Ponder destroyed his case file folders and had been doing so for about 20 years. The memorandum was no more than that testimony, referring to the recommendation for criminal investigation, which was a part of the trial, itself. Remoteness as basis was error.

SUMMATION

The matters discussed foregoing, as a bundle, show that no evaluation of the trial proceedings could reasonably be basis for a conclusion of fair trial, even if all other elements of the proceedings be considered as entirely fair arguendo the presence of these errors constructed a built-in conviction. No jury could fail to convict without these, because everything else was presented in a spurious package, neatly tied by exclusion of these essential items.

This Court, watchful always over proper observance of due process requirements for fair trial. It frequently has felt impelled to caution in carefully considered language, that the trial Court also should be so watchful. Two examples will suffice.

Even if guilt may be spelled out in the record, the finding of guilt must be according to the procedures and standards appropriate for criminal trials in Federal Courts. Bollenbach v. United States 66 S. Ct. 402 (326 U.S. 607, 614-15) 90 L.Ed. 350 (1946.) The procedures are fully as important as are substantive rules; the more important the rights at stake, the more important must be the procedural safeguards. Speiser v. Randall 78 S. Ct. 1332 (357 U.S. 513) 2 L. Ed. 2d. 1460, (1958.)

The procedures were so handled here that fair trial could not be accorded.

IV. Non-confrontation

The statement of the case supra (Item VI) makes its own argument. No person should be convicted alone on paper evidence not of

his making. The acceptance of those checks into evidence was prejudicial error in violation of constitutionally protected rights.

CONCLUSION

The petitioner has shown departure from constitutional standards of such magnitude as to affect the entire area of criminal jurisprudence. The dangers implicit in the violation of constitutional rights, plain on the face of the facts, clearly require intervention of the supervisory powers of this Court.

Respectfully submitted,

J. Lynn Ponder,
Post Office Box 217,
Amite, Louisiana 70422

Counsel for Petitioner

deQuincy V. Sutton,
2212 "B" Street,
Meridian, Mississippi 39301

Of Counsel

Certificate of Service

This is to certify that the within and foregoing petition for certiorari has been served on the United States of America, in five copies, by depositing the same in the United States mails, first-class postage fully prepaid, addressed to counsel for the United States at the last known address of said counsel, as follows: United States Solicitor General, Department of Justice, Washington, D.C. 20530.

J. Lynn Ponder

24th November 1971

Appendix 1

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LESLIE B. PONDER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(June 28, 1971)

Before BROWN, Chief Judge, WISDOM and RONEY, Circuit Judges.

RONEY, Circuit Judge: The defendant appeals a two count jury conviction for making false income tax returns for the years 1960 and 1961 in violation of Title 26, United States Code, Section 7206(1).[1] The trial last-

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[1] §7206. Fraud and false statements.
Any person who —
(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is vertified by a written declaration

ed seven weeks, involved 160 witnesses, and some 600 pieces of documentary evidence received or identified.

This appeal raises constitutional questions concerning the use of defendant's records and the composition of the grand jury, and trial questions concerning the court's instructions, the sufficiency of the evidence, the admission of evidence, and a statute of limitations defense to the 1960 return count. We reject all of the claims of error and affirm.

Defendant Ponder is an attorney at Amite, in Tangipahoa Parish, Louisiana. During the indictment years he also owned and operated a small hotel in Amite, held various corporation ownership interests and directorships, and participated, either through joint ventures or separately, in other business operations and sales of capital assets or collections of installment payments from such sales in prior years. His return was separate from that of his wife for each indictment year. The indictment alleged under-reporting of 1960 law business income and director's fees, and 1961 law business income, director's fees and interest income.[2]

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that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

[2] The government claimed that the evidence shows defendant under-reporting his 1960 law business income by $12,358.95, and his director fees by $600.00, and under-reporting his 1961 law business income by $11,580.80, his interest by $1,160.40, and his director fees by $1,000.00.

I. Use of Defendant's Records

The trial court denied motions by which defendant sought to suppress all evidence obtained or derived out of leads from certain of his business and financial records because of alleged violations of his rights under the Fourth (search and seizure) and Fifth (self-incrimination) Amendments to the United States Constitution.

The records in question were voluntarily submitted to the Internal Revenue Service during a civil audit.[3] Taxpayer contends that when he wrote and requested their return, the civil audit terminated, a criminal investigation was commenced, and his records were then copied in violation of his constitutional rights.[4] He reasons that such copying of his records was an illegal search and seizure, and that their use in evidence was compelled self-incrimination. He argues that the Service was under "a duty to advise of the change in status to that of a criminal case."

We hold otherwise. Ponder agreed to supply the records requested and voluntarily delivered them to the revenue agents. At that point there was a valid con-

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[3]The records consisted of a "Receipts Book" which was photocopied, admitted in evidence, and its contents used against Ponder; and numerous deposit records shown on check stubs giving names of those who paid him and amounts of settlements on claims of clients, not introduced in evidence, but which were used as sources for leads.

[4]Although the District Court found that the criminal investigation did not actually begin until after the records had already been copied by the civil division, it is unimportant to the result whether the records were copied for civil or criminal usage.

sent to a search, which carries with it the right to examine and photocopy. *McGarry v. Riley*, 363 F.2d 421 (1st Cir. 1966), cert. den., 385 U.S. 969, 87 S.Ct. 502, 17 L.Ed.2d 433 (1966); *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1956). Likewise there had been a waiver of the constitutional right against self-incrimination. The Fifth Amendment right not "to be compelled in any criminal case to be a witness against" one's self protects against compulsion and not voluntary acts, and must be asserted by refusing to deliver records in a case such as this. *Hanson v. United States*, 186 F.2d 61 (8th Cir. 1950). After the government obtained possession of the information with his consent, it was too late for Ponder then to claim constitutional immunity. *Nicola v. United States*, 72 F.2d 780 (3rd Cir. 1934). There is no doubt that the government can use information legitimately obtained during a civil audit in the prosecution of a criminal case. *Donaldson v. United States*, 400 U.S. 517 (1971); *Vern v. United States*, 400 F.2d 207 (5th Cir. 1968).

Two recent decisions by this Court deal directly with the argument that the Internal Revenue Service owed a duty to advise Ponder that the government was investigating the possible criminal implications in his returns. *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), cert. den., ___ U.S. ___, and *United States v. Tonahill*, 430 F.2d 1042 (5th Cir. 1970), cert. den., ___ U.S. ___.

In *Prudden*, the revenue agent was conducting a civil audit of defendant's return. Finding indications of fraud, he referred the matter to the Intelligence Divi-

sion. However, he continued his examination and requested further information from the defendant. Thereafter, he advised the defendant that he was being transferred and that another revenue agent would continue. The succeeding revenue agent appeared on the scene with a special agent of the Intelligence Division, who was identified as such. The two agents told the defendant they were examining his returns, but never told him that a criminal investigation was in progress and never advised him of his constitutional rights. The District Court suppressed all evidence obtained following the referral to the Intelligence Division. This Court reversed.

Similarly, *Tonahill* involved a referral to the Intelligence Division after a civil audit. There, following the appearance of a special agent, along with the original revenue agent, the defendant inquired of the agents why the examination was taking so long and whether fraud was involved. The agents did not advise the defendant whether fraud or a crime was involved, but stated that they were attempting to reconcile large discrepancies to see if they were the result of innocent errors. In reliance upon *Prudden*, this Court reversed the granting of a motion to suppress.

Thus *Prudden* and *Tonahill* hold that evidence received from the taxpayer after the criminal investigation commenced is admissible, even though no notice or *Miranda* warnings were given. *A fortiori* the evidence received from Ponder before the criminal investigation commenced is not rendered inadmissible merely because it was copied thereafter.

These cases recognize that evidence obtained for criminal use by deceit, fraud and misrepresentation might be suppressed, but held that failure to advise the taxpayer that a criminal investigation was being made did not amount to such conduct. Ponder argues that after his demand, the government's letter answer and the retention of the records practiced fraud, misrepresentation and deceit against him. The exchange of letters provide insufficient basis for such an argument, and certainly furnish no ground for upsetting the finding of the District Court that "there is not the slightest hint of any overbearing threat, trickery, or deception on the government's part."[8] Such findings

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[8] June 28, 1963

Mr. Wiltenmuth & Mr. Peter
Internal Revenue Service
301 American Bank Building
Baton Rouge, Louisiana
Dear Messrs. Wiltenmuth & Peter:

Please return my 1961 records because I need them in business. We have several references to run down that we have held up that we must close out soon, so would appreciate your returning them as soon as possible.

Yours very truly,
L. B. Ponder, Jr.

LBP:bs

U.S. TREASURY DEPARTMENT
Internal Revenue Service
Office of the District Director
3954 Florida Boulevard
Baton Rouge, Louisiana
July 2, 1963

Mr. L. B. Ponder, Jr.
P. O. Box 217
Amite, Louisiana
Dear Mr. Ponder:

We are trying to return your 1961 records to you as quickly as we can. However, we need them for a little while longer. Just as soon as we can we'll get them back to you.

are conclusive on this Court unless clearly erroneous. *United States v. Montos*, 421 F.2d 215 (5th Cir. 1970), cert. den., 397 U.S. 1022 (1970).

The question remains as to whether or not by retaining Ponder's records after he had demanded their return, the government converted a reasonable search into an unreasonable one, and compelled the defendant to give evidence that could not be obtained over objection under *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969). We held there that a taxpayer can successfully resist the production of records on Fifth Amendment grounds when the investigation has become an inquiry with dominant criminal overtones, even though

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Sincerely,
/s/ John P. Wiltenmuth, Jr.
John P. Wiltenmuth, Jr.
Group Supervisor, Group 5

July 3, 1963

Mr. John B. Wiltenmuth, Jr.
U. S. Treasury Department
Internal Revenue Service
3954 Florida Boulevard
Baton Rouge, Louisiana

Dear Mr. Wiltenmuth:

I have your letter of July 2, 1963 regarding the return of my 1961 records.

I have tried to cooperate with you fellows and gave you these records March 29, 1963 which I think is more than a reasonable length of time for you to keep the records and I must insist upon their return.

This will be the only month of the year that I will be out of Court long enough to check out some payments that I can only do through my check, hence, will appreciate the return of my records immediately.

Your very truly,
L. B. Ponder, Jr.

LBP/mr

the records had previously been examined by the government.

We hold that Ponder's demand for the return of his records did not transform to compulsion an otherwise voluntary submission to the Internal Revenue Service, and did not make the continued examination of the records an unreasonable search. That no such metamorphosis took place is readily apparent for several reasons.

First, the demand for return did not assert a constitutional basis, but on the other hand indicated that the defendant needed the records for business reasons. It placed no restriction on the use of the records by the government.

Second, as an experienced businessman and as a lawyer, Ponder was bound to be aware that any civil investigation could lead to criminal charges if the inquiry revealed wrongdoing and that any records he gave to the government which evidenced criminal activity might be used against him. *Cf., United States v. Prudden, supra*, and *United States v. Tonahill, supra.*

Third, once having voluntarily submitted records in response to a summons, it is only reasonable to assume that the government would conclude its examination and copy such records prior to return, even after a demand, and that it should have a reasonable time to do so. *Glotzbach v. Klavans*, 196 F.Supp. 685 (E.D.

Va. 1961), order vacated, 11 AFTR 2d 1191, 62-2 U.S.T.C. Par. 15,452 (4th Cir. 1962); *Caro v. Bingler*, 242 F.Supp. 418 (W.D.Pa. 1965).[5a]

II. Grand Jury

The defendant attacks the indictment on the ground that the grand jury which returned it was drawn from an improper list.[6] The contention that the list excluded persons from some of the 12 parishes in the Division is defeated by §1865(a) of Title 28, United States Code, which specifically authorizes the court to select the jurors from parts of a district.[7] This section, which descended from the original Judiciary Act of 1789, has been held constitutional repeatedly. *Lewis v. United States*, 279 U.S. 63 (1929); *Ruthenberg v. United States*, 245 U.S. 480 (1918).

As to the composition of the grand jury, defendant's evidence fails to support the contention that the jury

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[5a] We need not consider what Ponder's position would have been if he had demanded the return of his records for the declared purpose of protecting his constitutional rights.

[6] Defendant was indicted on December 5, 1967, prior to the Jury Selection and Service Act of 1968, 28 U.S.C. 1861, et seq.

[7] §1865. Apportionment within district; additional jury commissioners. (a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.

list did not represent the community,* or that the order of the District Court under Section 1865 was not followed. *Jackson v. Morrow*, 404 F.2d 903 (5th Cir. 1968); *Bloomer v. United States*, 409 F.2d 869 (9th Cir. 1969); *United States v. Skidmore*, 123 F.2d 604 (7th Cir. 1941), cert. den., 315 U.S. 500 (1942).

"The focus of the law is on the list from which the jury is drawn and not on the composition of a particular jury or grand jury." *Rabinowitz v. United States*, 366 F.2d 34, 59 (5th Cir. 1966).

The fact that defendant's home parish was not included does not render the list improper. *Lewis v. United States, supra; Agnew v. United States*, 165 U.S. 36 (1897).

As stated by Judge Learned Hand:

> "The statute confers a power which, like any other power, the court need, and indeed can, use only with approximate exactness; it is engaged, not in a scholastic exercise, but in the practical administration of justice." Gottfried v. United States, 165 F.2d 360 (2d Cir. 1948), cert. den., 333 U.S. 860 (1948).

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*At the hearing on the motion to dismiss the indictment, the only evidence offered by the defendant was a Louisiana Governmental Guide showing the population of the various parishes; an order of the District Court of January 20, 1967, providing that jurors would be selected from seven of the parishes in the New Orleans Division; a list of the members of the Grand Jury venire which subsequently indicted the defendant; and a Louisiana Highway map.

Having fully considered each of the defendant's objections to the grand jury, we find no error in the District Court's denial of the motion to dismiss the indictment.*

III. Instructions

Defendant objected to certain of the instructions as given by the trial court on the various grounds that they gave the jury an instruction that the prosecution evidence was assumed to be correct; that they gave to defendant the burden of proving his innocence; that they did not cover his defense; that they stated the law erroneously; and that they were not in accord with accepted rules as to instructions. Defendant made certain requests for instructions which were refused.

Having carefully studied all of the instructions as a whole, we conclude that they fairly instructed the jury on the applicable law and contain no prejudicial error, and that the objections were properly overruled and the requested instructions were properly refused. *Zeigler v. Seaboard Coast Line R. Co.*, 437 F.2d 80 (5th Cir. 1971); *Knight v. United States*, 123 F.2d 959 (5th Cir. 1941).

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*Ponder was originally indicted on March 30, 1967. On October 11, 1967, the original indictment was dismissed on grounds that the Grand Jury that returned the indictment was improperly constituted. On December 5, 1967, a superseding indictment was returned against Ponder by a new Grand Jury selected after this Court's decision in *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966). The order of January 20, 1967, under which this new Grand Jury was constituted was scrutinized by the District Court in *United States v. Brown*, 281 F.Supp. 31 (E.D.La. 1968).

IV. Motion for Judgment of Acquittal

The defendant contends that the Court should have granted a judgment of acquittal for lack of proof that the returns were signed by the defendant, or authorized to be signed on his behalf.

Although the defendant urges that this matter must be considered as the evidence stood at the time that the government rested its case in chief, this is clearly not the law. When a defendant introduces evidence after a denial of a motion for acquittal at the close of the government's case, the reviewing court should consider the entire record, including defendant's evidence. *United States v. Cashio*, 420 F.2d 1132 (5th Cir. 1970), cert. den., 397 U.S. 1007 (1970). The *Cashio* case also decided that the statutory presumption that an individual's name signed to a return furnishes prima facie evidence that the document was signed by him is sufficient to preclude a judgment of acquittal at the close of the government's case. 26 U.S.C. §6064.

The defendant's secretary, Mrs. Smith, testified for the defendant that the defendant signed the 1960 return, but that she had signed his name to the 1961 return. She further testified that she had prepared the 1961 return and that it was first submitted to the Internal Revenue Service unsigned. It was sent back to be executed. After two or three weeks, she signed the defendant's name to the return and sent it in, but claims that at no time did she show the return to the defendant and that he did not authorize her to sign it.

Taking the view of the evidence most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), there are sufficient circumstances present from which a reasonable jury could find that the defendant did authorize the filing of the return with his name subscribed to it. The returns were prepared in the defendant's law office by the defendant's secretary from the defendant's records over a period of weeks. The return involved a number of extraordinary items. It was signed under a declaration that the penalties of perjury applied to the return. The defendant had been under previous scrutiny of the Internal Revenue Service, and the jury might well have believed that Mrs. Smith would not have signed the return without authority and the defendant would not let tax time come and go without either making and filing his own return or authorizing someone to do it for him.

We conclude there was sufficient evidence from which the jury could connect the defendant with the preparation of the return for 1961. *United States v. Barnes*, 313 F. 2d 325 (6th Cir. 1963).

V. Statute of Limitations

Defendant seeks reversal of the conviction as to the 1960 return on the ground that the prosecution was barred by the six year statute of limitations.

The first indictment brought within the six year period was dismissed on October 11, 1967, because of an improperly constituted grand jury. By that time, the

six year period had expired, but within six months of the dismissal a new indictment was returned on December 3, 1967.

18 U.S.C. §3288 presents a complete answer to the statute of limitations defense.[10] The express purpose of Section 3288 is to extend the statute of limitations as to a person who has been charged under an indictment which "is dismissed for any error, defect or irregularity with respect to the grand jury."

The argument that the grand jury was "void" and its actions beyond redemption does not advance the defendant past Section 3288. Using the defendant's concept, the first indictment was at most "voidable," because any defects would have been waived unless timely presented. Therefore such defects are not jurisdictional. Rule 12(b) (2), Federal Rules of Criminal Procedure; *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 362 (1963).

The instant situation is exactly the kind of case to which 18 U.S.C. §3288 was intended to apply and prosecution was not barred.

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[10] 18 U.S.C. 3288 states that: "Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations."

VI: Admission of Evidence and Other Points on Appeal

Defendant appeals several rulings of the Court admitting evidence over objection and denying the admission of evidence he sought to introduce. He cites conduct of the Court which he deems prejudicial to his case. As to all of these issues not previously discussed, we find no reversible error and none which merit discussion.

The trial lasted seven weeks. A significant portion of the transcript of the proceedings is before this Court. It has all been read, the arguments of counsel have been carefully considered, and viewing the case as a whole, it appears from this review that the defendant had a fair trial and that his convictions must be sustained on this appeal.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

Appendix 2

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LESLIE B. PONDER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 28, 1971, 5 Cir., 1971, ____ F.2d ____).

(September 29, 1971)

Before BROWN, Chief Judge, WISDOM and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

Appendix 3

USCA 28: 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instruction are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

Appendix 4

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 400-600 ROYAL ST.
NEW ORLEANS, LA. 70130
TEL. NO. 527-6514

November 8, 1971

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Re: No. 29385 - U.S.A. vs. Leslie B. Ponder, Jr.

Gentlemen:

The following action has this day been taken in the above case:

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion for leave to file supplemental brief granted.

XXX A further stay of mandate has been granted to and including November 27, 1971.

( ) The Court's opinion-order on petition for rehearing and petition for rehearing en banc has this day been rendered and a copy thereof is enclosed.

( ) Joint Motion as to time for filing briefs granted.

( ) Order enclosed has been entered.

( )

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Claudette Strauss
Deputy Clerk

/cms

cc: Mr. J. Lynn Ponder
Mr. DeQuincy Sutton
Mr. Richard M. Olsen

FPI 32—12-14-70-150-5713

Appendix 5

Supreme Court of the United States

No. A-479 ~~-----, October Term, 19~~

LESLIE B. POSNER, JR.,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

November 27, 1971.

S/ POTTER STEWART
Associate Justice of the Supreme Court of the United States

Dated this 3rd
day of November ---, 19 71

Appendix 6

AMENDMENT IV
OF THE UNITED STATES CONSTITUTION
SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violate, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons to things to be seized.

Appendix 7

AMENDMENT V
OF THE UNITED STATES CONSTITUTION
CAPITAL CRIMES, DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix 8

AMENDMENT VI
OF THE UNITED STATES CONSTITUTION
JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State or District wherein the crime shall have been committed, which district shall have been preciously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Appendix 9

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

As part of the revision of the system of selecting and drawing grand and petit jurors for the New Orleans Division of this Court the order dated October 8, 1948 limiting the drawing of such jurors to the parishes of Orleans, Jefferson, Plaquemines, St. Bernard and St. Tammany, is hereby amended by adding the parishes of St. John the Baptist and St. Charles.

New Orleans, Louisiana January 20, 1967.

/s/Herbert W. Christenberry
United States District Judge
/s/Edw. J. Boyle, Sr.
United States District Judge
/s/Lansing L. Mitchell
United States District Judge
/s/A. Gordon West
United States District Judge
/s/Fred J. Cassibry
United States District Judge
/s/Alvin Rubin
United States District Judge
/s/Frederick J. R. Heebe
United States District Judge

Clerk's Office: A True Copy, January 20, 1967.
/s/Name not deciphered
Clerk, United States District Court, Eastern District of Louisiana, New Orleans, La.

Seal

Appendix 10

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

ORDER

In accordance with the authority contained in Section 1865 (a) of Title 28 U.S.C.A.

IT IS ORDERED that Petit Jurors for the New Orleans Division and Grand Jurors for the Eastern District of Louisiana be selected by the Clerk and by the Jury Commissioner only from the following parishes in the District, to-wit:

Orleans, Jefferson, Plaquemines, St. Bernard and St. Tammany.

New Orleans, Louisiana, October 8, 1948

/s/ Wayne G. Borah
United States District Judge
(Signed) Herbert W. Christenberry
United States District Judge

Clerk's Office: A True Copy January 20, 1965.

/s/ Name not deciphered
Deputy Clerk, U. S. District Court, Eastern District of Louisiana, New Orleans, La.

Seal

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In the Supreme Court of the United States

OCTOBER TERM, 1971

LESLIE BARBEE PONDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD.
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

JOHN P. BURKE,
JOSEPH H. REITER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the district court, partially printed in appellant's appendix in the court below at pages 150-151, is unreported. The opinion of the court of appeals (Pet. App. 32-46) is reported at 444 F. 2d 816. On September 29, 1971, rehearing was denied. (Pet. App. 47.)

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1971, and the petition for rehearing and rehearing *en banc* was denied on September 29, 1971. On November 3, 1971, Mr. Justice Stewart extended the time for filing the petition for a writ of certiorari to

November 27, 1971, and the petition was filed on November 24, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a criminal tax proceeding, the use of records which petitioner voluntarily turned over to the Internal Revenue Service during a civil tax audit violated petitioner's privilege against self-incrimination on the ground that the Internal Revenue Service did not immediately return the records to petitioner on his request but took the time to photocopy them before returning them.

2. Whether the list from which the indicting grand jury was drawn represented a fair cross-section of the community.

3. Whether the jury was adequately instructed on the element of materiality.

4. Whether the trial court's rulings on the admissibility of evidence denied the defendant a fair trial.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.) Sec. 7206 provides:

> *Fraud and false statements.*
>
> Any person who—
>
> (1) *Declaration under penalties of perjury:*—
>
> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made

> under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

28 U.S.C. (1964 ed.) 1865 provides:

> *Apportionment within district, additional jury commissioners.*
>
> (a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.
>
> * * * * *

STATEMENT

Petitioner, a businessman and a practicing attorney, was convicted, after a seven-week jury trial in the District Court for the Eastern District of Louisiana, of willfully making and subscribing to his 1960 and 1961 returns under penalty of perjury while not believing them to be true and correct as to every material matter. (Pet. App. 32-33.) Petitioner was sentenced to a jail-

type institution for 30 days, placed on probation for three years, fined $5,000 and directed to pay costs of $20,782.66. (Pet.Br.5.) [1] On appeal, the court below affirmed the conviction and denied petitioner's requests for a rehearing and rehearing *en banc*.

Evidence developed during pre-trial hearing and at trial revealed that, during a routine tax audit, the petitioner voluntarily turned over certain of his records to the Internal Revenue Service. (Tr. Nov. 14, 1969, p. 48.) Prior to referral of the matter to the Service's Intelligence Division, the petitioner, on May 7, 1963, asked for the return of his records for business purposes and for filing a petition in the Tax Court. (R. 83, 86-87; Tr. Nov. 14, 1969, p. 59.) [2] The records were first photocopied and then returned to the petitioner by the Audit Division of the Internal Revenue Service on July 15, 1963 (Tr. Nov. 14, 1969, p. 71). On August 9, 1963, the matter was referred to the Intelligence Division (Tr. Nov. 14, 1969, p. 54).

The petitioner was initially indicted on March 30, 1967, but on October 11, 1967, that indictment was dismissed under the reasoning of *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5), which condemned the grand jury selection procedure then in operation as precluding the selection of a fair cross-section of the community. (Pet. App. 42, n. 9.) On December 5, 1967, petitioner was re-indicted by a new grand jury, selected pursuant to a new plan designed by the district court

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[1] "Pet. Br." references are to the petitioner's brief filed in the court of appeals.

[2] "R." references are to the record appendix filed under the same cover with petitioner's brief in the court of appeals.

to overcome the objections voiced in *Rabinowitz*. (R. 150-151.)[3] The new selection plan called for the selection of jurors from the voting lists of seven parishes, and allowed no discretion to the clerk of the court or the jury commissioners as to when, or to whom, questionnaires were to be sent. *United States* v. *Brown, supra.* Names from two of the parishes were never placed into the jury wheel because the court inadvertently had failed to provide the clerk with those lists. *United States* v. *Brown, supra,* p. 34.

ARGUMENT

The decision below is correct. There is no conflict with any other decisions or any other ground for further review.

1. This Court's decisions establish that constitutional rights may be waived effectively by the voluntary act of a competent person. *Townsend* v. *Sain,* 372 U.S. 293, 307; *Blackburn* v. *Alabama,* 361 U.S. 199, 211; *Pate* v. *Robinson,* 383 U.S. 375; *Westbrook* v. *Arizona,* 384 U.S. 150. Here, the taxpayer waived any Fourth and Fifth Amendment rights he may have had to the records when he voluntarily turned them over during his civil audit. As the court below reasoned, his subsequent request for return of the documents does not destroy the waiver, which carried with it the right to examine and photocopy. See *Glotzbach* v. *Klavans,* 196 F. Supp.

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[3] This indicting grand jury was selected at the same time as the indicting grand jury in *United States* v. *Brown,* 281 F. Supp. 31 (E.D. La.). The United States made the record in the *Brown* case part of the record in this case. (R. 150.)

685 (E.D. Va.), order vacated, 11 A.F.T.R. 2d 1191, 62-2 U.S.T.C., par. 15,452 (C.A. 4); *Caro* v. *Bingler*, 242 F. Supp. 418 (W.D. Pa.); *McGarry* v. *Riley*, 363 F. 2d 421 (C.A. 1), certiorari denied, 385 U.S. 969; *Boren* v. *Tucker*, 239 F. 2d 767 (C.A. 9). Nor is the validity of the waiver affected, in the absence of fraudulent conduct on the part of the government investigator, by virtue of the termination of the civil audit and the subsequent criminal investigation. *Donaldson* v. *United States*, 400 U.S. 517.[4]

2. The grand jury which indicted petitioner on December 5, 1967 (before the enactment of the Jury Selection and Service Act of 1968, P.L. 90-274, 82 Stat. 53, amending 28 U.S.C. 1861 *et seq.*), was properly constituted. The members were drawn from voter registration lists, and the clerk could use no discretion in the random selection. Cf. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217. The fact that the district court inadvertently failed to supply the clerk with names from two parishes does not indicate that the grand jury was improperly constituted, because there was no systematic and intentional exclusion. *Ballard* v. *United States*, 329 U.S. 187, 191. As this Court has stated, the grand jury need not be a perfect mirror of the community (*Swain* v. *Alabama*, 380 U.S. 202, 208); in this regard, the fact that no grand juror was from the plaintiff's parish is without legal significance. *United States* v. *Chaires*, 40 Fed. 820, 822-823 (N.D. Fla.); Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 364.

[4] Significantly, petitioner did not base his request for return of the records on a claim of constitutional privilege (Pet. App. 40, n. 5A).

See also *Agnew* v. *United States*, 165 U.S. 36; *Lewis* v. *United States*, 279 U.S. 63.

3. Petitioner contends (Pet. 8-9, 24-26) that the district court did not adequately charge the jury as to what was a "material matter" within the meaning of the indictment and Section 7206(1) of the Internal Revenue Code of 1954.[5] The existence of a tax deficiency is not, as petitioner appears to believe, an element of this offense.[6] *Schepps* v. *United States*, 395 F. 2d 749

[5] The charge given to the jury on materiality was as follows (Tr. Nov. 17, 1969, p. 17):

> The third element which the government must prove beyond a reasonable doubt is that the maker did not believe the return to be true and correct as to every material matter. In connection with income tax returns, such as are here involved, in determining whether an item or items contained in the return are material, the test is not whether the government has actually sustained a loss or damage because of the statement, and the test is not whether the government relied on the statement. The test is whether or not the false statements contained in the report or return has a natural tendency or is capable of influencing a decision on the part of the Internal Revenue Service as to whether or not the tax declared by the taxpayer to be due is correct, or whether or not the items alleged to be false were essential or useful to the department in verifying or auditing the return of the taxpayer. In other words, any item contained in an income tax return which would substantially affect the amount of tax declared to be due, would be a material element of the return.

Petitioner's only objection to this charge was that the third complete sentence in the quoted charge was better stated in the fourth sentence in that charge. (Tr. Nov. 17, 1969, p. 46.)

[6] Petitioner's contention in this respect is tied to his claim that the Internal Revenue Service had made a determination that no additional tax was due for 1960 and 1961, and that the district court made a finding to this effect. (Pet. 8, 25; Pet. Br. 9). Although petitioner alleges that Special Agent Smith testified that there was no tax deficiency (Pet. 8, 25), that witness in fact testified that he determined that there were understatements of income for both

(C.A. 5), certiorari denied, 393 U.S. 925; *Edwards* v. *United States*, 375 F. 2d 862, 865 (C.A. 9). The court correctly instructed the jury (Tr. Nov. 17, 1969, p. 17) that the matter misrepresented is material if it could have influenced the Internal Revenue Service in auditing a tax return, and that any item in a tax return which would substantially affect the tax due would be material.

4. Petitioner makes two other contentions, each of which was properly rejected by the court of appeals (Pet. App. 41). Testimony of insurance company officials proved that five checks were issued to petitioner on account of settlement of claims of four of petitioner's clients who were deceased at the time of trial (Tr. Dec. 9, 11, 1969, pp. 2-148). The amount of the settlement checks which petitioner issued to his clients for their share of these settlements was allowed to petitioner as a reduction of income, and all unidentified checks issued by petitioner were also allowed in reduction of income (R. 117-143). Although advances made

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1960 and 1961 (Tr. Dec. 15, 1969, p. 53-54), and the government's summary of the evidence showed understatements of income for 1960 and 1961, respectively, of $12,958.95 and $13,740 (R. 129, 143). The district court, in ruling on petitioner's motion to suppress use of his records, reviewed the testimony of a government witness to the effect that "the civil audit terminated on July 8, 1963, when it was referred to the Intelligence Division for consideration of possible criminal violations of the Internal Revenue Code; * * *" (R. 90). This was not a finding by the court that the Internal Revenue Service had made a no-deficiency determination, and the initial examining revenue agent, who referred the case to the Intelligence Division on July 8, 1963, testified that he did so because he found what appeared to be "a gross understatement of income." The civil settlement is postponed in such cases. (Tr. Dec. 12, 1969, pp. 21, 73.)

by petitioner to clients in years before 1960 were not allowed in reduction of income received during 1960 or 1961, this was correct in view of his use of a cash basis in reporting his income. (Tr. Dec. 12, 1969, p. 12.)

Petitioner complains (Pet. 11-12) that certain of his office file jackets were not admitted into evidence. He had told the initial examining agent, however, that these files were no longer available to substantiate income and expenses (Tr. Dec. 12, 1969, pp. 48-49), and the district court properly ruled that no adequate foundation had been established by petitioner (who did not testify) to make such files admissible as to the truth of the notations on the file jackets (Tr. Dec. 23 and 26, 1969, pp. 60-64).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

SCOTT P. CRAMPTON,
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Attorneys.

JANUARY 1972.

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